IN THE

COURT OF SPECIAL APPEALS OF MARYLAND

September Term, 2001
No. 887

CHARLES A. MOOSE, *et al.*,

Appellants

v.

FRATERNAL ORDER OF POLICE,
MONTGOMERY COUNTY LODGE 35, INC., *et al.*

Appellees

On Appeal from the Circuit Court for Montgomery County, Maryland
(Paul A. McGuckian, Judge)

BRIEF OF APPELLANTS

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STATEMENT OF THE CASE

This case arises from the suspension of a police officer with pay while the Montgomery County Police Department investigated allegations that the officer had used excessive force in the performance of his duties. The Fraternal Order of Police (FOP) joined the officer in filing a complaint for declaratory judgment to obtain a declaration of the rights of the parties under the Law Enforcement Officers' Bill of Rights (LEOBR),[1] Md. Ann. Code art. 27, § 734A(2) (1996). (E. 1-7) The circuit court initially concluded that the officer's rights had not been violated by one-person review of the reasonableness of the suspension. (E. 65) A prior appeal to this Court led to the remand of the matter to the circuit court for it to address all of the issues. (E. 64-68)

On remand, the circuit court declared that both the LEOBR and the department's administrative procedures require a three-person hearing board to review a suspension with pay. (E. 78) As authorized by Md. Code Ann., Cts. & Jud. Proc. § 3-411 and § 12-301 (1998), the County noted a timely appeal from the circuit court's erroneous decision. (E. 79)

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[1]This Court occasionally has referred to the statute as the LEOBOR. *See Calhoun v. Baltimore City Police Department*, 103 Md. App. 660, 663, 654 A.2d 905, 907 (1995) (citing *Nichols v. Baltimore Police Department*, 53 Md. App. 623, 627, 455 A.2d 446, 449, *cert. denied*, 296 Md. 111 (1983)).

QUESTIONS PRESENTED

I. Under the Law Enforcement Officers' Bill of Rights, does the requirement for a "prompt hearing" mean that the charges against the officer must be disposed of promptly, or does the provision require an additional hearing before a three-member board to address the sole issue of the reasonableness of the suspension prior to addressing the charges?

II. Do the administrative procedures of the Montgomery County Police Department require a three-person hearing board to review the police chief's decision to suspend an officer's police powers with pay?

STATUTES, ORDINANCES AND CONSTITUTIONAL PROVISIONS

The full text of all relevant statutes, ordinances and constitutional provisions appears in the appendix to this brief.

STATEMENT OF FACTS

In April 1999, the department suspended Officer Doe's[2] police powers with pay. The officer remained actively employed, but was prohibited from making arrests and exercising those other incidental powers that flow from the sovereign power of arrest. The notice of suspension explained that the officer had "been named as an involved officer in no less than three serious ongoing internal investigations. Two of the investigations have yielded credible witness testimony which indicates excessive use of force was deployed by you while in the performance of your duties." (E. 8) The notice also informed the officer that a person selected by the police chief would review the

[2]The trial court permitted the officer to participate as "John Doe".

suspension. (E. 8) The FOP and the officer filed a declaratory judgment action asserting that the officer was entitled to a three-person hearing, which they argued must be in addition to the later hearing that would resolve the charges. (E. 1-7)

ARGUMENT

Montgomery County has been fortunate enough to have a police department peopled with exceptional men and women who have earned the respect of the community and other law enforcement agencies. Even in the best police department some officers occasionally fail to meet the high standards set for them.[3] When one is a rogue officer, the police chief must act to protect the public from the substantial threat that the officer poses to public safety.[4]

In weighing the need to protect the public from an officer's intemperate behavior against the disruptive, costly, and lengthy hearings to review a *temporary* suspension while charges are pending (but not yet proved), the circuit court mistakenly shifted the

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[3]Nationally, issues of police misconduct generate many articles and much discussion. *See* Chin and Wells, *The "Blue Wall of Silence" as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. Pitt. L. Rev. 233 (1998); Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 Buff. L. Rev. 1275 (1999); Koepke, *The Failure to Breach the Blue Wall of Silence: The Circling of the Wagons to Protect Police Perjury*, 39 Washburn L.J. 211 (2000).

[4]Failing to act when aware of possible misconduct also can impose significant liability on the government whose officer behaves inappropriately. *See* Allen, Annotation: *Liability of Supervisory Officials and Governmental Entities for Having Failed to Adequately Train, Supervise, or Control Individual Peace Officers Who Violate Plaintiff's Civil Rights under 42 U.S.C.S. § 1983*, 70 A.L.R. Fed. 17 (1984). Furthermore, it can lead to sanctions imposed by the United States Department of Justice.

balance to favor bureaucracy over public safety. On appeal, this Court must determine whether the Legislature intended to turn the LEOBR's requirement for a prompt hearing into a requirement of multiple hearings. The County contends that a police chief must act to protect—not sacrifice—public safety, and must not be intimidated by the prospect of lengthy review hearings. Common sense supports this interpretation of the LEOBR.

I. UNDER THE LAW ENFORCEMENT OFFICERS' BILL OF RIGHTS, THE "PROMPT HEARING" THAT THE STATUTE IDENTIFIES DOES NOT REQUIRE A SEPARATE REVIEW OF THE POLICE CHIEF'S DECISION, BUT RATHER, IT REQUIRES A PROMPT HEARING ON THE CHARGES AGAINST THE OFFICER.

The Declaration of Independence contemplates many inalienable rights, but the sovereign power to arrest and to exercise the authority of a police officer remains a privilege to be earned. For this reason, law enforcement power is bestowed upon those few individuals who have shown themselves to be worthy of the highest trust in a democratic society through training and conduct. By enacting the LEOBR, the Legislature focused on employment rights—not on the authority to arrest, or to carry a gun and badge. The circuit court's interpretation of the law eschews reason. It allows a hearing board to second-guess a decision by the police chief to suspend an officer's police powers temporarily, even though the officer's employment benefits remain undiminished.

Public policy suggests that the LEOBR only requires a three-person hearing on the merits of the charges against an officer.

The General Assembly enacted the LEOBR in 1974 to afford police officers certain procedural safeguards during an investigation into their conduct as well as for the subsequent hearing that might lead to discipline. *Fraternal Order of Police, Lodge 35 v. Mehrling*, 343 Md. 155, 181, 680 A.2d 1052, 1065 (1996). The LEOBR generally protects an officer from losing the benefits of employment (salary, rank, or employment) and ensures the use of fair investigative techniques. The protections afforded by the LEOBR to officers, however expansive, do not override the community's interest in public safety, nor do they define the scope of the police chief's authority to manage the police agency and to discipline individual officers. *Id*.

The LEOBR does not require police management to turn a blind eye to allegations of excessive force, but requires a department to engage in a cautious balance between protecting the officer from unfounded complaints and the community's interests:

> Police brutality is a serious matter. Its existence, or even its apparent existence, can have adverse effects within a police agency and on the agency's relationship with the community it serves. A conscientious police commander cannot condone brutality and must have the discretion to punish any of his officers who engage in it. The commander also must have the concomitant authority to initiate investigations to determine whether the excessive use of force has occurred.

Baltimore City Police Department v. Andrew, 318 Md. 3, 17-18, 566 A.2d 755, 762 (1989) (footnote omitted). The authority to transfer an officer to administrative duties and to restrict the officer's arrest powers during an investigation goes hand in hand with the

police chief's duty to eradicate brutality from the department. Even the most unenlightened community would find it curious for a police chief to investigate an officer for brutality without creating some protection against a recurrence while the investigation proceeds.

The case before this Court involves the balance between the officer's preference to exercise the police power and the police chief's ability to protect the safety of the public and the integrity of the police department. An officer whose police powers are suspended and who is transferred to administrative duties with pay does not lose a tangible benefit of employment, but loses only the arrest power and the accompanying authority that permits the officer to remain armed and cloaked with the sovereign power of the State. During a time when the department needs to resolve questions concerning a person's ability to use that authority and force properly, limiting an officer's police powers serves the best interests of all involved by protecting the officer's employment benefits, the department's integrity, and the community's safety.

The circuit court effectively interpreted the LEOBR to require a police department to empanel two hearing boards—one to review an officer's temporary transfer to administrative duties with full pay and the other to review the merits of the charges. This view undermines public safety. Not only does it create an inference that an officer has a *right* to arrest and to be armed—not a privilege—but it suggests that a police chief cannot act to prevent the likely consequences of allowing a rogue officer to remain on the streets. Constitutionally, an employee has a right to a hearing before suffering a property

deprivation, whether by termination or by suspension without pay. *See City of Annapolis v. Rowe*, 123 Md. App. 267, 279-280, 717 A.2d 976, 982 (1998). In *Rowe*, this Court distinguished a suspension with pay from a suspension without pay. Where an employee is suspended with pay, no entitlement to a pre-suspension hearing arises, while an employee who is suspended without pay becomes entitled to a hearing beforehand—only the latter situation creates a deprivation that has the effect of a termination. *Id.*

The County voluntarily chose to provide an avenue for review of the police chief's decision to suspend an officer's police powers with pay, even though no loss of employment benefits occurs. The LEOBR does not impose the burden of conducting a full-blown hearing upon suspending an officer with pay, but instead requires the police chief to determine what is in the best interest of the public and the police department, while specifically protecting the exercise of managerial authority:

> This subtitle does not limit the authority of the chief to regulate the competent and efficient operation and management of a law-enforcement agency by any reasonable means including but not limited to, transfer and reassignment where that action is not punitive in nature and where the chief determines that action to be in the best interests of the internal management of the law-enforcement agency.

Md. Ann. Code art. 27, § 728(c). When the police chief suspended the officer's police powers in this case, the officer continued to work and to receive full pay and benefits. The suspension entitled the officer to a prompt hearing—not duplicate hearings.

Statutory construction principles confirm that a suspension with pay need not be reviewed by a three-person hearing board.

The LEOBR intends that a full evidentiary hearing before a three-member board will resolve the merits of a "complaint" against a law enforcement officer. Md. Ann. Code art. 27, §§ 727, 730. When hearing a "complaint," the hearing board must make a decision that includes findings of fact and recommended punishment, but cannot bind the police chief as to punishment. *Id.* at § 731(a) & (b). Nothing in this menu for the hearing board's action calls for a review of a temporary suspension of an officer's powers of arrest. Indeed, only after the chief acts to *punish* the officer can the officer initiate an appeal. *Id.* at § 732.

The statute does not specify how the police chief must act when suspending an officer's powers of arrest. Md. Ann. Code art. 27, § 734A. Rather, the LEOBR allows the chief of police to impose an emergency suspension with pay upon determining that "the action is in the best interest of the public and the law enforcement agency." Md. Ann. Code art. 27, § 734A(2)(i). Similarly, the police chief may "suspend the police powers of the officer and reassign the officer to restricted duties pending a . . . final determination by an administrative hearing board as to any departmental violation." Md. Ann. Code art. 27, § 734A(2)(ii). The LEOBR mandates only a procedural requirement of "a prompt hearing." Md. Ann. Code art. 27, §734A(2)(iii).

A logical reading of the statute suggests that the prompt hearing in § 734A(2)(iii) refers to the final determination of an administrative hearing board identified in

§734A(2)(ii), representing the full hearing on the merits of the disciplinary charges. By definition, a "hearing board" is a "board authorized by the chief to hold a hearing on a *complaint* against a law enforcement officer. . . ." Md. Ann. Code art. 27, § 727(d)(1) (emphasis added). This definition clearly limits the hearing board's authority to "complaints against the officer," and does not discuss review of a suspension with pay. To escape this limitation on the proceedings before a hearing board, the FOP reads only that part of the definition that describes the composition of the board and ignores the scope of the hearing board's review.[5]

The character of the hearing contemplated in the LEOBR further suggests that the statute requires only one full hearing, by including a notice provision that does not require prior notice of an emergency suspension:

> (a) Notice; record. If the investigation or interrogation of a law enforcement officer results in the recommendation of some action, such as demotion, dismissal, transfer, loss of pay, reassignment, or similar action which would be considered a punitive measure, then, except as provided under subsection (c) of this section and *except in the case of summary punishment or emergency suspension as allowed by § 734A* of this subtitle and before taking that action, the law enforcement agency shall give notice to the law enforcement officer that he is entitled to a hearing on the issues by a hearing board. The notice shall state the time and place of the hearing

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[5]The distinction appears even more patently in the administrative procedure, which explains that a hearing board makes findings of fact, recommends punishment, and judges the validity of the charges. (E. 26, 30-31) A suspension hearing, however, reviews only the reasonableness of the suspension and does not determine guilt or innocence. (E. 31) Nor could the board recommend punishment when reviewing only a temporary suspension with pay. In effect, the suspension review provides an opportunity for an officer to explain why the officer need not remain on suspension with pay. It does not duplicate the evidentiary hearing on the merits of the charges.

> and the issues involved. An official record, including testimony and exhibits, shall be kept of the hearing.

Md. Ann. Code art. 27, § 730(a) (emphasis added). The delineation of the hearing board's authority specifically excludes suspensions imposed under § 734A of the LEOBR and the mandates a full hearing only upon the conclusion of an investigation that results in a recommendation of discipline. *Meyers v. Montgomery County*, 96 Md. App. 668, 686, 626 A.2d 1010, 1019 (1993). The officer also receives a copy of the complete investigatory file "not less than 10 days before *any hearing*." Md. Ann. Code art. 27, § 728(b)(5)(iv).

As a practical matter, a full-blown trial-type hearing[6] on the "complaint" cannot occur at the suspension stage, because the investigation has not been completed. When the chief suspends an officer pending an investigation of alleged misconduct, no investigatory file yet exists to provide to the officer. Only after the investigation has been conducted can an investigatory file exist. Only after a statement of charges has been issued does the threat of discipline or punishment exist.

Moreover, the LEOBR provides an appeal only from the decision on the merits of the disciplinary charges. *See* Md. Ann. Code art. 27, § 732 and § 731, respectively. "The right to take an appeal is entirely statutory, and no person or agency may prosecute an

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[6]This Court has likened the hearing provided by the LEOBR to a "full-blown trial in circuit court." *See Meyers*, 96 Md. App. at 686-687, 626 A.2d at 1019 (quoting *City of Hagerstown v. Moats*, 81 Md. App. 623, 631, 568 A.2d 1181, 1185 (1990), *aff'd*, 324 Md. 519, 597 A.2d 972 (1991)).

appeal unless the right is given by statute." *Maryland-National Capital Park and Planning Commission v. Smith*, 333 Md. 3, 7, 633 A.2d 855, 857 (1993) (quoting *Subsequent Injury Fund v. Pack*, 250 Md. 306, 309, 242 A.2d 506, 509 (1968)).[7]

The circuit court's decision, on the other hand, leads to the absurd result where a police chief may decide that it serves the best interests of the public to suspend an officer with pay, and then have to submit that decision to a potentially disruptive, time-consuming, and expensive hearing board, which can make only a recommendation to the police chief that the chief need not follow and from which no right of appeal exists.

Construing the statute's reference to "prompt hearing" to mean the disciplinary hearing, however, protects an officer from an indefinite suspension and requires a prompt final determination regarding the officer's conduct. This interpretation conforms with general principles of statutory construction by giving the statute its plain meaning and reading it in the context of the entire statute. *Edgewater Liquors, Inc. v. Liston*, 349 Md. 803, 808, 709 A.2d 1301, 1303 (1998) (citations omitted).

This Court should avoid an interpretation of the LEOBR that overlooks common sense and "would seriously hamper a local chief's ability to manage and discipline the police agency." *Baltimore City Police Department v. Andrew*, 318 Md. at 18, 566 A.2d at 762. When an officer faces allegations of having used excessive force, the police chief

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[7]Perhaps Officer Doe and the FOP believe that by requiring a hearing board the courts will find a basis to review the board's recommendation under common law principles allowing judicial review of administrative proceedings. Such a concept might easily turn the courts into an elevated grievance review board.

must have the ability to assure the community that the officer will resume police duties only after a full investigation and hearing on the merits of the charges. To allow subordinates to conduct time-consuming, expensive and disruptive trial-type hearings interferes with the effectiveness of the department and can replace the community's confidence in the police department with distrust and apprehension. Even more troubling would be to allow the officer to subpoena the accuser at an early stage in the investigation, possibly intimidating a victim of police brutality and adversely affecting the administration of justice.

The FOP's position, as adopted by the circuit court, calls for a trial-type hearing to occur once the chief suspends an officer's police powers with pay. To conduct a full-blown hearing at this stage, however, often duplicates the hearing on the charges—the officer issues subpoenas to witnesses to testify regarding the officer's work history and even the facts surrounding the incident that triggered the suspension. These witnesses may include other officers, which triggers overtime pay and additional staffing costs to cover for officers who are called away from duty or brought to testify while off-duty. The Legislature could not have intended that a department incur these ample expenses twice just because a police chief chooses to protect the best interests of the public and the department by suspending an officer with pay during an investigation.

The legislative history of the LEOBR further supports a practical interpretation of § 734A(2).

Even when a statute seems clear and unambiguous, this Court refers to the legislative purpose, history and context of a statute to interpret the law. *See Prince George's County Police Department v. Zarragoitia*, 139 Md. App. 168, 180, 775 A.2d 395 (2001) (citations omitted). As originally enacted, the emergency suspension provision did not distinguish between suspensions with pay and suspensions without pay, but stated only that "[e]mergency suspension may be imposed by the Chief when it appears that the action is in the best interest of the public and the law-enforcement agency. . . ." 1975 Md. Laws ch. 809. (E. 51) In 1987, the Legislature amended the general suspension language and delineated criteria for suspensions with pay that differed from suspensions without pay:

> If the officer is suspended with pay, the Chief may suspend the police powers of the officer and reassign the officer to restricted duties pending a determination by a court of competent jurisdiction with respect to any criminal violation or final determination by an administrative hearing board as to any departmental violation.
>
> * * *
>
> Emergency suspension of police powers without pay may be imposed by the Chief if a law enforcement officer has been charged with the commission of a felony.

1987 Md. Laws ch. 777 and ch. 778. (E. 53-54) Each type of suspension also gave an officer a right to a prompt hearing. In doing so, the statute clearly referred to the hearing on the disciplinary charges and did not create an additional hearing to review the suspension. *See* Senate Judicial Proceedings Committee, Summary of Committee Report for SB 475. (E. 56-59)

Although this Court has reviewed one case that involved a suspension of a police officer *without* pay, at that time the statute did not yet distinguish between a suspension *without* pay and a suspension *with* pay. *See Mayor of Westernport v. Duckworth*, 49 Md. App. 236, 431 A.2d 709 (1981). Moreover, the department had failed to provide Officer Duckworth with a full evidentiary hearing before termination of his employment. This Court made clear that an officer has a right to a hearing *before* being dismissed. *Westernport*, 49 Md. App. at 245, 431 A.2d at 713-714. Following *Westernport*, the Legislature amended the statute to distinguish between suspensions with pay and those without pay. (E. 53-54) The distinction reflects the variety of circumstances that may justify a suspension of an officer's police powers, including for medical reasons, while investigating the use of fatal force or firing a weapon, or while awaiting the outcome of the hearing once disciplinary charges have been issued.

The circuit court's ruling permits an inference that the department could hold a prompt hearing to review the suspension and then substantially delay the hearing on the merits of the disciplinary action. This result contravenes the purpose of the LEOBR, while the County's interpretation of a "prompt hearing" as a reference to the full disciplinary hearing on the merits promotes the purpose of the LEOBR. *See Zarragoitia*, 139 Md. App. at 187, 775 A.2d 395 (failure to file administrative charges within 1 year of knowledge of alleged misconduct by an appropriate person precludes disciplinary proceedings based on those acts). The County's practice of voluntarily conducting a one-person review of the suspension prior to the disciplinary hearing affords officers an

opportunity to correct misunderstandings in a more detached atmosphere and offers the police chief a chance to step back from the controversy and reconsider a suspension dispassionately, but without disrupting the department or an investigation.

In the present case, the police chief determined that the suspension of the officer with pay appropriately addressed the safety needs of the public, while protecting the reputation and integrity of the agency, because the officer was the subject of "three serious ongoing internal investigations," two of which involved allegations of excessive force. (E. 8) In doing so, the chief complied with the LEOBR and decided to reassign the officer to duties that did not require the use of police powers pending completion of the investigation and a final determination in the disciplinary action. Under these circumstances, the suspension of the officer's police powers with pay cannot be construed as an evaluation of the merits of the misconduct charges, nor does it resolve the disciplinary matter. Rather, the suspension with pay served to protect the public from the perceived threat of an officer having the use of a gun and badge while facing possible termination of his employment.

II. THE ADMINISTRATIVE PROCEDURES OF THE MONTGOMERY COUNTY POLICE DEPARTMENT DO NOT REQUIRE A THREE-PERSON HEARING BOARD TO REVIEW THE POLICE CHIEF'S DECISION TO SUSPEND AN OFFICER'S POLICE POWERS WITH PAY.

The FOP sought a declaration under the County's administrative procedures in addition to its request for a declaration under the LEOBR.[8] Apparently basing its decision on a provision in the regulations that describes what a hearing board chair should say at the beginning of the hearing, the circuit court erroneously construed the County's procedures to require a three-person hearing board.

The general canons of statutory construction apply to the interpretation of administrative regulations. *Chesapeake Industrial Leasing Co. v. Comptroller of the Treasury*, 331 Md. 428, 440, 628 A.2d 234, 240 (1993). This means that a court will consider the plain language of the regulations to determine the legislative intent and will read all provisions together, using common sense and logic. Where an agency has developed its own guidelines in response to a statute, unless that interpretation conflicts with the statute, the courts will defer to the agency's interpretation. *See Blondell v. Baltimore City Police Department*, 341 Md. 680, 698 n.15, 672 A.2d 639, 648 n.15 (1996). Applying these rules in this case confirms that the police department regulations

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[8]The FOP seeks to give full force and effect to the department's function code in this case, even though it argued just as vociferously the unenforceability of a rule created in the same manner in *Fraternal Order of Police, Lodge 35 v. Mehrling*, 343 Md. at 180, 680 A.2d at 1064 (police chief could not impose a form of discipline described in a departmental rule that had not been enacted in accordance with the code requirements for regulations).

remain consistent with the LEOBR and do not require a three-person panel to review the suspension of an officer's police powers.

By definition, the sole suspension hearing referenced in the administrative procedure relied upon by the FOP and the lower court involves a suspension without pay:

> **Emergency Suspension** - An action by the Chief of Police, or designee, to temporarily relieve an officer of powers of arrest and use of police equipment, *and to discontinue pay*.

(E. 26) This section cannot be used as a basis to describe the hearing in a matter involving a suspension *with* pay. Thus, any reference in the rules to an "emergency suspension," by definition, must apply only to suspensions *without* pay.

Even if the procedures applied to suspensions with pay, "[t]he purpose of the suspension hearing is to determine whether the suspension of an officer by the Chief of Police, or designee, is *reasonable under the circumstances*." (E. 31) This standard of review differs markedly from a hearing on a complaint held by the administrative hearing board:

> [T]he procedures for the suspension hearing will follow that of the Administrative Hearing Board *with the following exceptions*:
>
> (a) The Suspension Hearing Board *does not bring forth* to the chief *a finding of fact*, but merely *examines the evidence to the point of determining the reasonableness of the suspension*;
>
> (b) Since the board *does not determine guilt or innocence*, the "preponderance of the evidence" rule applies *only to that amount of evidence necessary to determine the reasonableness of the suspension*; and
>
> (c) The board *does not recommend punishment*, but merely *recommends action on the issue of suspension*.

(Emphasis added.) (E. 31) The procedures do not describe the composition of an emergency suspension board any more than the LEOBR does. And the statement contained in the format that is attached to the regulation does not create a substantive right to a three-member panel for a suspension hearing. The format shown as an appendix simply provides a sample litany for the board to read during hearings and serves as a guide for the person conducting the hearing to follow. (E. 39-41) Obviously, the language remains subject to modification to reflect the actual composition of the hearing entity.

The Legislature chose to give the police chief broad discretion to determine whether a suspension is "in the best interests of the internal management of the law enforcement agency." Md. Ann. Code art. 27, § 728(c). The department's procedures provide no greater requirement for suspension hearings than do the provisions of the LEOBR. Rather than representing the department's interpretation of the LEOBR, the procedures simply repeat the parameters identified in the State law.

CONCLUSION

The police chief must have the discretion to remove an officer's police powers to protect the public safety and the integrity of the department. The LEOBR recognizes this authority and requires only that an officer receive a "prompt hearing" when the officer's police powers are suspended with pay. Common sense dictates that the officer's entitlement to a "prompt hearing" means only that the trial-board hearing on the disciplinary action must be prompt and not that an additional hearing must be held prior

to or separately from the eventual hearing on the merits. Even if an additional hearing is required, the County's practice of using a one-person review satisfies the protections of the LEOBR, because a suspension with pay does not affect the officer's salary or other employment benefits. Only at the disciplinary hearing does the officer face the loss of rank, salary, or benefits. This Court should reverse the circuit court's misinterpretation of the LEOBR and the County's administrative procedures to require a three-person review of the reasonableness of the suspension of an officer's police powers with pay, and direct the entry of a judgment declaring:

A. The LEOBR's requirement in Md. Ann. Code art. 27, § 734A(2), of a "prompt hearing" following the suspension of an officer with pay requires the department to conduct a disciplinary hearing on charges against the officer promptly and does not require a hearing concerning the department's decision to suspend the officer with pay.

B. Montgomery County's voluntary procedure authorizing review of the department's decision to suspend an officer with pay does not require a three-person hearing board as described in the LEOBR.

Respectfully submitted,

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Statement pursuant to Maryland Rule 8-504(a)(8): This brief was prepared with proportionally spaced type, using Times New Roman font and 13pt type size.

APPENDIX

Excerpts from Maryland Annotated Code, Art. 27

§ 727. Definitions; hearing boards.

(a) In general. As used in this subtitle, the following words have the meanings indicated.

(b) Law enforcement officer. "Law enforcement officer" means any person who, in an official capacity, is authorized by law to make arrests and who is a member of one of the following law enforcement agencies:

(1) The Department of State Police;

(2) The Baltimore City Police Department;

(3) The Baltimore City School Police Force;

(4) The police department, bureau, or force of any county;

(5) The police department, bureau, or force of any incorporated city or town;

(6) The office of the sheriff of any county or Baltimore City;

(7) The police department, bureau, or force of any bicounty agency;

(8) The Maryland Transportation Authority Police and the police forces of the Department of Transportation;

(9) The police officers of the Department of Natural Resources;

(10) The Investigative Services Unit of the Comptroller's Office;

(11) Housing Authority of Baltimore City Police Force;

(12) The Crofton Police Department;

(13) The police officers of the Department of Health and Mental Hygiene;

(14) The police officers of the Department of General Services;

(15) The police officers of the Department of Labor, Licensing, and Regulation;

(16) The State Fire Marshal or a full-time investigative and inspection assistant of the Office of the State Fire Marshal; or

(17) The police officers of the University System of Maryland.

(c) Exceptions from definition of law enforcement officer. "Law enforcement officer" does not include an officer serving in a probationary status except when allegations of brutality in the execution of his or her duties are made involving an officer who is in a probationary status. The provisions of this subtitle do not apply to persons serving at the pleasure of the Police Commissioner of Baltimore City or the appointing authority of a charter county or to a police chief of any incorporated city or town. The term "probationary status" includes only an officer who is in that status upon initial entry into the Department.

(d) Hearing board. "Hearing board" means:

(1) A board which is authorized by the chief to hold a hearing on a complaint against a law enforcement officer and which consists of not less than three members, except as provided in paragraphs (2) and (3) of this subsection, all to be appointed by the chief and selected from law enforcement officers within that agency, or law enforcement officers of another agency with the approval of the chief of the other agency, and who

have had no part in the investigation or interrogation of the law enforcement officer. At least one member of the hearing board shall be of the same rank as the law enforcement officer against whom the complaint has been filed.

(2) (i) The provisions of this paragraph may not be the subject of binding arbitration.

(ii) An agency or an agency's superior governmental authority that has recognized and certified an exclusive collective bargaining representative may negotiate with the exclusive collective bargaining representative an alternate method of forming a hearing board.

(iii) A law enforcement officer may elect the alternate method of forming a hearing board instead of the method described in paragraph (1) of this subsection if the law enforcement officer works within an agency described in subparagraph (ii) of this paragraph and the law enforcement officer is included in the collective bargaining unit.

(iv) An agency described in subparagraph (ii) of this paragraph shall notify the law enforcement officer in writing before the formation of the hearing board that the law enforcement officer may elect an alternate method of forming a hearing board if one has been negotiated under this paragraph.

(v) If the law enforcement officer elects an alternate method of forming a hearing board under this paragraph, the alternate method shall be used to form the hearing board.

(vi) An agency or an exclusive collective bargaining representative may not require a law enforcement officer to elect an alternate method of forming a hearing board under this paragraph.

(vii) If the law enforcement officer has been offered summary punishment, an alternate method of forming a hearing board may not be used.

(3) If a law enforcement officer is offered summary punishment imposed pursuant to § 734A and refuses, the chief may convene a one-member or more hearing board and the hearing board shall have only the authority to recommend the sanctions as provided in this subtitle for summary punishment. If a single member hearing board is convened, that member need not be of the same rank. However, all other provisions of this subtitle shall apply.

(e) Hearing. "Hearing" means any meeting in the course of an investigatory proceeding, other than an interrogation, at which no testimony is taken under oath, conducted by a hearing board for the purpose of taking or adducing testimony or receiving other evidence.

(f) Summary punishment. "Summary punishment" is punishment imposed by the highest ranking officer of a unit or member acting in that capacity, which may be imposed when the facts constituting the offense are not in dispute. Summary punishment may not exceed three days suspension without pay or a fine of $150.

(g) Chief. "Chief" means the superintendent, commissioner, chief of police, or sheriff of a law enforcement agency, or the officer designated by the official.

(h) Interrogating officer; investigating officer. "Interrogating officer", "investigating officer", and all other forms of those terms mean:

(1) Any sworn law enforcement officer; or

(2) If requested by the Governor, the Attorney General of Maryland or the Attorney General's designee.

§ 728. Right to engage in political activity; investigation or interrogation of officer; officer's right to sue; adverse material in officer's file.

(a) Right to engage in political activity. A law enforcement officer has the same rights to engage in political activity as are afforded to any State employee. This right to engage in political activity shall not apply to any law enforcement officer when he is on duty or when he is acting in his official capacity.

(b) Procedure to be followed at interrogation or investigation; record; representation by counsel; statute or regulation abridging right to sue; insertion of adverse material into officer's file; chief under investigation; polygraph examination. Whenever a law enforcement officer is under investigation or subjected to interrogation by a law enforcement agency, for any reason which could lead to disciplinary action, demotion or dismissal, the investigation or interrogation shall be conducted under the following conditions:

(1) The interrogation shall be conducted at a reasonable hour, preferably at a time when the law enforcement officer is on duty, unless the seriousness of the investigation is of such a degree that an immediate interrogation is required.

(2) The interrogation shall take place either at the office of the command of the investigating officer or at the office of the local precinct or police unit in which the incident allegedly occurred, as designated by the investigating officer, unless otherwise waived by the law enforcement officer, or at any other reasonable and appropriate place.

(3) The law enforcement officer under investigation shall be informed of the name, rank, and command of the officer in charge of the investigation, the interrogating officer, and all persons present during the interrogation. All questions directed to the officer under interrogation shall be asked by and through one interrogator during any one interrogating session consistent with the provisions of subsection (b) (6) of this section.

(4) A complaint against a law enforcement officer, alleging brutality in the execution of his duties, may not be investigated unless the complaint be duly sworn to by the aggrieved person, a member of the aggrieved person's immediate family, or by any person with firsthand knowledge obtained as a result of the presence at and observation of the alleged incident, or by the parent or guardian in the case of a minor child before an official authorized to administer oaths. An investigation which could lead to disciplinary action under this subtitle for brutality may not be initiated and an action may not be taken unless the complaint is filed within 90 days of the alleged brutality.

(5) (i) The law enforcement officer under investigation shall be informed in writing of the nature of the investigation prior to any interrogation.

(ii) Upon completion of the investigation, the law enforcement officer shall be notified of the name of any witness and all charges and specifications against the officer not less than 10 days prior to any hearing.

(iii) In addition, the law enforcement officer under investigation shall be furnished with a copy of the investigatory file and any exculpatory information, but excluding:

1. The identity of confidential sources;

2. Any nonexculpatory information; and

3. Recommendations as to charges, disposition, or punishment.

(iv) The law enforcement officer under investigation shall be furnished with a copy of the investigatory file and the exculpatory information described under subparagraph (iii) of this paragraph not less than 10 days before any hearing if the officer and the officer's representative agree:

1. To execute a confidentiality agreement with the law enforcement agency to not disclose any of the material contained in the record for any purpose other than to defend the officer; and

2. To pay any reasonable charge for the cost of reproducing the material involved.

(6) Interrogating sessions shall be for reasonable periods and shall be timed to allow for any personal necessities and rest periods as are reasonably necessary.

(7) (i) The law enforcement officer under interrogation may not be threatened with transfer, dismissal, or disciplinary action.

(ii) This subtitle does not prevent any law enforcement agency from requiring a law enforcement officer under investigation to submit to blood alcohol tests, blood, breath, or urine tests for controlled dangerous substances, polygraph examinations, or interrogations which specifically relate to the subject matter of the investigation. This subtitle does not prevent a law enforcement agency from commencing any action which may lead to a punitive measure as a result of a law enforcement officer's refusal to submit to a blood alcohol test, blood, breath, or urine tests for controlled dangerous substances, polygraph examination, or interrogation, after having been ordered to do so by the law enforcement agency. The results of any blood alcohol test, blood, breath, or urine test for controlled dangerous substances, polygraph examination, or interrogation, as may be required by the law enforcement agency under this subparagraph are not admissible or discoverable in any criminal proceedings against the law enforcement officer when the law enforcement officer has been ordered to submit thereto. The results of a polygraph examination may not be used as evidence in any administrative hearing when the law enforcement officer has been ordered to submit to a polygraph examination by the law enforcement agency unless the agency and the law enforcement officer agree to the admission of the results at the administrative hearing.

(8) A complete record, either written, taped, or transcribed, shall be kept of the complete interrogation of a law enforcement officer, including all recess periods. Upon completion of the investigation, and upon request of the law enforcement officer under

investigation or his counsel, a copy of the record of his interrogation shall be made available not less than ten days prior to any hearing.

(9) If the law enforcement officer under interrogation is under arrest, or is likely to be placed under arrest as a result of the interrogation, he shall be completely informed of all his rights prior to the commencement of the interrogation.

(10) (i) At the request of any law enforcement officer under interrogation, the officer shall have the right to be represented by counsel or any other responsible representative of his choice who shall be present and available for consultation at all times during the interrogation, unless waived by the law enforcement officer.

(ii) Counsel or any other responsible representative of a law enforcement officer under interrogation as provided under subparagraph (i) of this paragraph, may:

1. Request a recess at any point during the interrogation for consultation with the officer;

2. Enter an objection to any question posed during the interrogation; and

3. State on the record the reason for an objection outside the presence of the officer.

(iii) The interrogation shall be suspended for a period of time not to exceed ten days until representation is obtained. However, the chief may, for good cause shown, within that ten-day period, extend that period of time.

(11) A statute may not abridge and a law enforcement agency may not adopt any regulation which prohibits the right of a law enforcement officer to bring suit arising out of his duties as a law enforcement officer.

(12) (i) A law enforcement agency may not insert any adverse material into any file of the officer, except the file of the internal investigation or the intelligence division, unless the officer has an opportunity to review, sign, receive a copy of, and comment in writing upon the adverse material, unless the officer waives these rights.

(ii) A law enforcement officer, upon written request, may have any record of a formal complaint made against him expunged from any file if:

1. The law enforcement agency investigating the complaint has exonerated the officer of all charges in the complaint, or determined that the charges were unsustained or unfounded, or an administrative hearing board acquits, dismisses, or makes a finding of not guilty; and

2. 3 years have passed since the findings by the law enforcement agency or administrative hearing board.

(13) (i) If the chief is the law enforcement officer under investigation, the chief of another law enforcement agency in this State shall function as the law enforcement officer of the same rank on the hearing board.

(ii) If the chief of a State law enforcement agency is under investigation, the Governor shall appoint the chief of another law enforcement agency as the law enforcement officer of the same rank on the hearing board.

(iii) If the chief of a county or municipal law enforcement agency is under investigation, the official who may appoint the chief's successor shall appoint the chief of another law enforcement agency as the officer of the same rank on the hearing board.

(iv) If the chief of a State law enforcement agency or the chief of a county or municipal law enforcement agency is under investigation, the official who may appoint the chief's successor, or that official's designee, shall function as chief for the purposes of this subtitle.

(14) The law enforcement officer's representative need not be present during the actual administration of a polygraph examination by a certified polygraph examiner, if the questions to be asked are reviewed with the law enforcement officer or his representative prior to the administration of the examination, the representative is allowed to observe the administration of the polygraph examination, and if a copy of the final report of the examination by the certified polygraph operator is made available to the law enforcement officer or his representative within a reasonable time, not to exceed ten days, after the completion of the examination.

(c) Effect of subtitle on chief's authority. This subtitle does not limit the authority of the chief to regulate the competent and efficient operation and management of a law enforcement agency by any reasonable means including but not limited to, transfer and reassignment where that action is not punitive in nature and where the chief determines that action to be in the best interests of the internal management of the law enforcement agency.

* * *

§ 730. Hearing before demotion, dismissal, transfer, etc.; limitation of actions.

(a) Notice; record. If the investigation or interrogation of a law enforcement officer results in the recommendation of some action, such as demotion, dismissal, transfer, loss of pay, reassignment, or similar action which would be considered a punitive measure, then, except as provided under subsection (c) of this section and except in the case of summary punishment or emergency suspension as allowed by § 734A of this subtitle and before taking that action, the law enforcement agency shall give notice to the law enforcement officer that he is entitled to a hearing on the issues by a hearing board. The notice shall state the time and place of the hearing and the issues involved. An official record, including testimony and exhibits, shall be kept of the hearing.

(b) Limitation of actions.

(1) Administrative charges may not be brought against a law enforcement officer unless filed within 1 year after the act that gives rise to the charges comes to the attention of the appropriate law enforcement agency official.

(2) The 1-year limitation of paragraph (1) of this subsection does not apply to charges related to criminal activity or excessive force.

(c) Hearings for convicted felons. A law enforcement officer is not entitled to a hearing under this section if the law enforcement officer has been charged and convicted of a felony.

(d) Conduct of hearing. The hearing shall be conducted by a hearing board. Both the law enforcement agency and the law enforcement officer shall be given ample opportunity to present evidence and argument with respect to the issues involved. Both may be represented by counsel.

(e) Evidence. Evidence which possesses probative value commonly accepted by reasonable and prudent men in the conduct of their affairs shall be admissible and shall be given probative effect. The hearing board conducting the hearing shall give effect to the rules of privilege recognized by law, and shall exclude incompetent, irrelevant, immaterial, and unduly repetitious evidence. All records and documents which any party desires to use shall be offered and made a part of the record. Documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference.

(f) Cross-examination and rebuttal of witnesses. Every party has the right of cross-examination of the witnesses who testify, and may submit rebuttal evidence.

(g) Judicial notice. The hearing board conducting the hearing may take notice of judicially cognizable facts and, in addition, may take notice of general, technical, or scientific facts within its specialized knowledge. Parties shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material so noticed, and they shall be afforded an opportunity and reasonable time to contest the facts so noticed. A hearing board may utilize its experience, technical competence, and specialized knowledge in the evaluation of the evidence presented.

(h) Oaths or affirmations. With respect to the subject of any hearing conducted pursuant to this subtitle, the chief or the officer designated by the chief shall administer oaths or affirmations and examine any individual under oath.

(i) Witness fees and expenses. Witness fees and mileage, if claimed, shall be allowed the same as for testimony in a circuit court. Witness fees, mileage, and the actual expenses necessarily incurred in securing attendance of witnesses and their testimony shall be itemized, and shall be paid by the law enforcement agency.

(j) Summonses.

(1) The chief, or hearing board, as the case may be, shall in connection with any disciplinary hearing have the power to administer oaths and to issue summonses to compel the attendance and testimony of witnesses, and the production of books, papers, records, and documents as may be relevant or necessary. These summonses may be served in accordance with the Maryland Rules pertaining to service of process issued by a court, without cost. Any party may request the chief or hearing board to issue a summons or order under the provisions of this subtitle.

(2) In case of disobedience or refusal to obey any of these summonses, the chief, or hearing board, may apply to the circuit court of any county where the summoned party resides or conducts business, for an order requiring the attendance and testimony of the witness and the production of books, papers, records, and documents, without cost.

Upon a finding that the attendance and testimony of the witness, or the production of the books, papers, records, and documents sought is relevant or necessary, the court may issue an order requiring the attendance, testimony, or production of books, papers, records and documents without cost, and any failure to obey an order of the court may be punished by the court as a contempt thereof.

§ 731. Decision or order; findings of fact; recommendations for action; procedure following finding of guilt; punishment; final order or decision.

(a) Decision or order; findings of fact; recommendations for action; procedures generally. Any decision, order, or action taken as a result of the hearing shall be in writing and shall be accompanied by findings of fact. The findings shall consist of a concise statement upon each issue in the case. A finding of not guilty terminates the action. If a finding of guilt is made, the hearing board shall reconvene the hearing, receive evidence, and consider the law enforcement officer's past job performance and other relevant information as factors before making its recommendations to the chief. A copy of the decision or order and accompanying findings and conclusions, along with written recommendations for action, shall be delivered or mailed promptly to the law enforcement officer or to his attorney or representative of record and to the chief. The person who may take any disciplinary action following any hearing in which there is a finding of guilt shall consider the law enforcement officer's past job performance as a factor before he imposes any penalty.

(b) Recommendation of punishment. After the disciplinary hearing and a finding of guilt, the hearing board may recommend punishment as it deems appropriate under the circumstances, including but not limited to demotion, dismissal, transfer, loss of pay, reassignment, or other similar action which would be considered a punitive measure.

(c) Review by chief, final order by chief. The written recommendations as to punishment are not binding upon the chief. Within 30 days of receipt of the hearing board's recommendations, the chief shall review the findings, conclusions, and recommendations of the hearing board and then the chief shall issue a final order. The chief 's final order and decision is binding and may be appealed in accordance with this subtitle. Before the chief may increase the recommended penalty of the hearing board, the chief personally shall:

(1) Review the entire record of the hearing board proceedings;

(2) Meet with the law enforcement officer and permit the law enforcement officer to be heard on the record;

(3) Disclose and provide to the officer in writing at least 10 days prior to the meeting any oral or written communication not included in the hearing board record on which the decision to consider increasing the penalty is based, in whole or in part; and

(4) State on the record the substantial evidence relied on to support the increase of the recommended penalty.

(d) When order or decision of hearing board final.

(1) Notwithstanding any other provisions of this subtitle, the decision of the hearing board, both as to findings of fact and punishment, if any, is final:

(i) If a chief is an eyewitness to the incident under investigation; or

(ii) If an agency or its superior governmental authority has agreed with an exclusive collective bargaining representative recognized or certified under applicable law that the decision is final.

(2) The provisions of paragraph (1) (ii) of this subsection may not be the subject of binding arbitration.

(3) The decision then may be appealed in accordance with § 732 of this subtitle.

§ 732. Appeals.

Appeal from decisions rendered in accordance with § 731 shall be taken to the circuit court for the county pursuant to Maryland Rule 7-202. Any party aggrieved by a decision of a court under this subtitle may appeal to the Court of Special Appeals.

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§ 734A. Summary punishment or emergency suspension.

The provisions of this subtitle are not intended to prohibit summary punishment or emergency suspension by higher ranking law enforcement officers as may be designated by the head of a law enforcement agency.

(1) Summary punishment may be imposed for minor violations of departmental rules and regulations when: (i) the facts which constitute the minor violation are not in dispute; (ii) the officer waives the hearing provided by this subtitle; and (iii) the officer accepts the punishment imposed by the highest ranking officer of the unit to which the officer is attached.

(2) (i) Emergency suspension with pay may be imposed by the chief when it appears that the action is in the best interest of the public and the law enforcement agency.

(ii) If the officer is suspended with pay, the chief may suspend the police powers of the officer and reassign the officer to restricted duties pending a determination by a court of competent jurisdiction with respect to any criminal violation or final determination by an administrative hearing board as to any departmental violation.

(iii) Any person so suspended shall be entitled to a prompt hearing.

(3) (i) Emergency suspension of police powers without pay may be imposed by the chief if a law enforcement officer has been charged with the commission of a felony.

(ii) Any person so suspended shall be entitled to a prompt hearing.